JAN 15 2010

No. 09-375

In the Supreme Court of the United States

BALDASSARE AMATO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in excluding extrinsic evidence of a witness's prior inconsistent statements.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not reported in the Federal Reporter but is available at 306 Fed. Appx. 630. The opinion of the district court (Pet. App. 11A-26A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2009. A petition for rehearing was denied on April 27, 2009 (Pet. App. 27A-28A). On July 21, 2009, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including September 24, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of racketeering conspiracy, in violation of 18 U.S.C. 1962(d); engaging in an illegal gambling business, in violation of 18 U.S.C. 1955; and conspiring to engage in an illegal gambling business, in violation of 18 U.S.C. 371. He was sentenced to life imprisonment. The court of appeals affirmed. Pet. App. 1A-10A.

1. Petitioner was a soldier and "made" member in the Bonanno organized crime family of La Cosa Nostra for at least 30 years. He participated in the crime family's illegal gambling business, controlling "Joker-Poker" machines and a seasonal baccarat card game. Gov't C.A. Br. 5-7, 10-11.

Petitioner also was responsible for two murders. On May 4, 1992, petitioner murdered Robert Perrino at the behest of Bonanno family underboss Salvatore Vitale. Perrino was the superintendent of deliveries at the New York Post and a Bonanno associate. The Bonanno family feared Perrino would cooperate with police in an investigation of the family's corrupt influence at the paper, and decided to order his killing. Vitale first asked a Bonanno captain to find shooters from Canada to kill Perrino. The captain was unable to do so, but suggested to Vitale in petitioner's presence that Vitale use petitioner to accomplish the murder. Petitioner readily agreed. Petitioner was later observed at the murder scene by one of the Bonanno associates assigned to dispose of Perrino's body. Gov't C.A. Br. 15-18.

Petitioner also ordered the murder of Sebastiano DiFalco. Petitioner and DiFalco had a financial dispute related to a restaurant called Giannini. After several

failed attempts, petitioner's order was carried out by others in February 1992. Gov't C.A. Br. 11-15.

2. At trial, Vitale testified for the government and discussed petitioner's role in the Perrino and DiFalco murders. Vitale admitted that he and Bonanno consiglieri Anthony Spero decided that Perrino should be killed because, based on information they received from Bonanno associate Richard Cantarella and others, they feared that Perrino would "spill the beans" about the Bonanno crime family's illegal activities. Pet. C.A. App. 131. Vitale described the plans for the murder that he and Spero developed. *Id.* at 131-134; Gov't C.A. Br. 16. During cross-examination, petitioner's counsel questioned Vitale about his meetings with Cantarella and their discussions about killing Perrino. Vitale testified that Cantarella "volunteered" that Perrino was showing signs of weakness. Pet. C.A. App. 147. Vitale also testified that it was Cantarella, rather than Vitale, who suggested Perrino's killing. *Ibid.* Vitale denied having a "personal interest" in having Perrino killed. *Id.* at 148. With respect to the DiFalco murder, Vitale testified that he had learned from Bonanno boss Joseph Massino that petitioner killed DiFalco because petitioner believed that DiFalco was stealing money from the Giannini restaurant. Gov't C.A. Br. 12-13.

About three weeks after Vitale completed his testimony, petitioner first informed the government and the district court that he intended to call Cantarella and others to impeach Vitale's testimony with prior inconsistent statements. Gov't C.A. Br. 31-32. According to petitioner, Cantarella would testify that Vitale told him that Perrino "was 'weak' and might cooperate, thereby indicating Perrino must be killed—which Cantarella

believed reflected Vitale's own personal concerns should Perrino cooperate." Pet. C.A. App. 105.

The government moved to exclude this testimony under Federal Rule of Evidence 613(b). Pet. App. 11A. Rule 613(b) provides in relevant part that, "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." The district court granted the government's motion and excluded the evidence. Pet. App. 11A-26A.

The court first concluded that petitioner's cross-examination of Vitale did not satisfy Rule 613(b)'s requirement that the witness be given an opportunity to explain or deny the statement. Although petitioner asked Vitale some questions about his conversations with Cantarella, Pet. App. 12A-14A, the court found that these "exchanges * * * [were] embedded within a lengthy examination of Vitale's conversations with other alleged members of the Bonanno * * * family" about the Perrino murder and that it was "unclear from the entire cross-examination whether [petitioner] [was] impeaching Vitale based on extrinsic evidence of inconsistent statements, or simply probing Vitale's recollection of the events in question to elicit contradictions in Vitale's testimony," *id.* at 21A-22A. It also found that "[petitioner's] counsel neither confronted Vitale with the purported evidence of the inconsistent statements," nor asked any "questions that put Vitale on notice of the extrinsic evidence of a prior inconsistent statement." *Id.* at 22A. Given these considerations, the court found that petitioner "did not provide Vitale with sufficient oppor-

tunity to explain or deny the prior inconsistent statement." *Ibid.*

The court next decided to adhere to "the prevailing practice" set forth in Judge Weinstein's "widely respected evidence treatise" to determine whether petitioner properly placed the government and the court on notice of his intent to impeach Vitale under Rule 613(b). Pet. App. 23A. Under that approach, "[w]hen an impeaching party does not confront a witness with the specifics of a prior inconsistent statement, the party should 'inform[] the court and opposing counsel, at the time the witness testifies, of the intention to introduce' the extrinsic evidence to alert the court and opposing party to the potential need to 'keep the witness available to be called to explain the statement.'" *Ibid.* (second set of brackets in original) (quoting 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 613.05[5], at 613-28 (Joseph M. McLaughlin ed., 2d ed. Oct. 2004) (*Weinstein*)). Applying that rule, the court concluded that petitioner "did not provide this court or the Government with sufficient notice under Rule 613(b)." *Id.* at 24A.

Finally, the court considered other factors that informed the exercise of its discretion. Referring to its authority to control the order of witnesses and presentation of evidence under Federal Rule of Evidence 611(a), the court noted that the statements that petitioner wished to admit "primarily implicate[d] the collateral matters of Vitale's role, motive and interest in ordering Perrino's death." Pet. App. 25A. It also concluded that calling Cantarella and others would present "a much greater logistical burden" on the government and "sacrifice the orderly conduct of this trial." *Id.* at 25A-26A.

It therefore granted the government's motion to exclude petitioner's extrinsic impeachment evidence. *Ibid.*

The jury found petitioner guilty on all counts, and the district court sentenced him to concurrent terms of life imprisonment. Pet. App. 2A.

3. The court of appeals affirmed in an unpublished summary order. Pet. App. 1A-10A. As relevant here, it summarily rejected petitioner's claims "concerning various evidentiary rulings and [found] no abuse of discretion or denial of due process." *Id.* at 9A.

ARGUMENT

Petitioner contends (Pet. 15-38) that the courts of appeals are divided on the requirements for admitting evidence of prior inconsistent statements under Federal Rule of Evidence 613(b) and that the district court violated his Fifth and Sixth Amendment rights to due process, confrontation, and "other fair trial rights" (Pet. 15) when it excluded extrinsic evidence of a witness's prior inconsistent statements. The court of appeals' unpublished decision finding no abuse of discretion in the district court's evidentiary ruling does not merit this Court's attention.

1. Federal Rule of Evidence 613(b) provides, in relevant part, as follows:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

Rule 613(b) does not specify when the party seeking to introduce the prior inconsistent statement must afford the witness the opportunity to explain or deny the state-

ment. See Fed. R. Evid. 613(b) advisory committee's note to 1972 Proposed Rule 613. As a result, most courts of appeals agree that Rule 613(b) does not prohibit a district court from admitting extrinsic evidence of a prior inconsistent statement solely because the witness's opportunity to explain or deny the statement did not precede its admission. See 4 *Weinstein* § 613.05[2][a] at 613-18 to 613-19 (Feb. 2008 & Feb. 2009); see also, *e.g.*, *United States* v. *Schnapp*, 322 F.3d 564, 571 (8th Cir. 2003) ("The rule, on its face, does not require that the witness be cross-examined about the alleged prior inconsistent statement *before* that statement may be presented as impeachment evidence."); *United States* v. *Bibbs*, 564 F.2d 1165, 1169 (5th Cir. 1977) (Rule 613(b) does not "require that impeachment foundation precede the impeaching witness' [*sic*] testimony."), cert. denied, 435 U.S. 1007 (1978). But see *United States* v. *Bonnett*, 877 F.2d 1450, 1461-1462 (10th Cir. 1989) ("Under Fed. R. Evid. 613(b) and Fed. R. Evid. 801(d)(1), before a prior inconsistent statement may be introduced, the party making the statement must be given the opportunity to explain or deny the same."). "Most courts hold that the requirements of Rule 613(b) are met if the witness has an opportunity to explain after the contents of the statement are made known to the jury," for example by recalling the witness to testify. 4 *Weinstein* § 613.05[2][a] at 613-18 to 613-18.1 (Feb. 2009); see *United States* v. *Moore*, 149 F.3d 773, 781 (8th Cir.) ("One method of providing such an opportunity [for the witness to explain the statement and the opposing party to examine the statement] is to allow recall of the witness after the prior statement is admitted."), cert. denied, 525 U.S. 1030 (1998), and 525 U.S. 1082 (1999).

But while the rule does not forbid the district court from admitting extrinsic evidence when Rule 613(b)'s requirements have not first been satisfied, neither does it require the court to do so. *United States* v. *Young*, 248 F.3d 260, 268 (4th Cir.) ("Rule 613(b), however, speaks only to when extrinsic proof of a prior inconsistent statement is inadmissible; it says nothing about the admissibility of such evidence."), cert. denied, 533 U.S. 961 (2001); *United States* v. *Soundingsides*, 825 F.2d 1468, 1470 (10th Cir. 1987) ("The Rule merely states that a witness must have an opportunity to deny or explain a prior inconsistent statement and that the opposite party must have an opportunity to question him about it if extrinsic evidence of the statement is admitted. The Rule does not state the converse, namely that extrinsic evidence of a prior statement must be admitted in all cases where a witness has had an opportunity to confront and explain it."). Pursuant to their authority to "exercise reasonable control over the mode and order" of a trial (Fed. R. Evid. 611(a)), "trial courts have the discretion to exclude testimony about a prior statement that was not revealed while the witness was on the stand." 4 *Weinstein* § 613.05[2][a] at 613-19 (Feb. 2008).[1]

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[1] Accord *United States* v. *Barile*, 286 F.3d 749, 756 (4th Cir. 2002) ("Although we conclude that the prior inconsistent statements * * * are admissible under Rule 613(b), our inquiry does not end because, 'even if all the foundational elements of Rule 613 are met, a district court is not unequivocally bound to admit any or all extrinsic evidence of a prior inconsistent statement.' * * * 'Rather, a district court may still exercise its discretion to exclude such evidence.'") (quoting *Young*, 248 F.3d at 268); *United States* v. *Hames*, 185 Fed. Appx. 318, 322 (5th Cir. 2006) (unpublished) (even if Rule 613(b) does not require that impeachment foundation precede the introduction of the impeachment evidence, a district court does not abuse its discretion "when it in fact re-

As a consequence, Rule 613(b)'s "procedure is not mandatory, but is optional at the trial judge's discretion." *Schnapp*, 322 F.3d at 571 (internal quotation marks and citation omitted); see *United States* v. *Marks*, 816 F.2d 1207, 1211 (7th Cir. 1987) ("We do not think Rule 613(a) was intended to take away the district judge's discretion to manage the trial in a way designed to promote accuracy and fairness; and while it would be wrong for a judge to say, 'In my court we apply the common law rule, not Rule 613(a),' he is entitled to conclude that in particular circumstances the older approach should be used in order to avoid confusing witnesses and jurors."). Indeed, "confronting a witness with his inconsistent statement prior to its introduction into evidence" continues to be the "*preferred* method of proceeding." *Wammock* v. *Celotex Corp.*, 793 F.2d 1518, 1522 (11th Cir. 1986); *United States* v. *Barrett*, 539 F.2d 244, 255-256 (1st Cir. 1976) (laying prior foundation for extrinsic evidence is "good practice" but not "absolutely required"); see also *id.* at 255 (noting that, when Rule 613 was proposed, the Reporter of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States testified that, in his view, "the existing practice would continue in general to be followed under the rule. It is convenient and effective to raise

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quires a foundation before admitting extrinsic evidence of the impeachment. * * * To hold otherwise would severely limit the trial courts' broad discretion in controlling the manner and presentation of evidence at trial."); *United States* v. *Surdow*, 121 Fed. Appx. 898, 899 (2d Cir. 2005) (unpublished) (trial court's broad discretion under Fed. R. Evid. 611(b) "permits it to exclude extrinsic impeachment evidence 'that was not revealed while the witness was on the stand,' or at least before the witness was permitted to leave the court") (quoting 4 *Weinstein* § 613.05[1], at 613-19 (2004)).

the matter on cross-examination, and doing so would avoid problems that might ultimately arise if witnesses become unavailable before the end of the trial") (quoting *Rules of Evidence (Supplement): Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 75 (1973)).

2. In this case, after considering relevant factors, the district court exercised its discretion to exclude petitioner's extrinsic impeachment evidence. Pet. App. 22A-26A. This discretion plainly was not abused. In light of petitioner's failure to confront Vitale with the purportedly inconsistent statement or to promptly inform the government and the court that it intended to impeach Vitale with his prior inconsistent statements to Cantarella, the district court was rightfully concerned that producing federal witnesses to New York from other parts of the country, including those in the Witness Security Program, would "present a * * * logistical burden on the Government," *id.* at 25A, "delay the trial," *ibid.*, and interfere with the goal of orderly trial administration embodied in Rules 611(a) and 613(b), *id.* at 26A. The court also properly considered, in excluding the evidence, that the prior inconsistent statements implicated only collateral matters pertaining to Vitale's "role, motive and interest in ordering Perrino's death," *id.* at 25A, and did not relate to petitioner or his participation in Perrino's murder.

3. Contrary to petitioner's suggestion (Pet. 15-19), the district court's decision does not conflict with the First Circuit's decision in *Barrett*, *supra*. *Barrett* held that extrinsic evidence of a prior inconsistent statement was not inadmissible *solely* because the witness was not first given an opportunity to explain it, but nevertheless suggested that the court "might properly in its discre-

tion have refused to receive the [extrinsic impeachment evidence]" had the witness become unavailable for recall or had the district justified its decision by reference to "judicial economy and convenience." 539 F.2d at 256. The district court's decision here was consistent with this approach, as the court excluded petitioner's evidence only after finding that considerations of judicial economy counseled against calling Cantarella. Pet. App. 25A. Moreover, the First Circuit has since clarified that *Barrett* does not call in question the district court's discretionary authority to insist that the foundation required by Rule 613(b) precede admission of the impeachment evidence. *United States* v. *Hudson*, 970 F.2d 948, 956 n.2 (1st Cir. 1992) ("Even if a proponent is not always required to lay a prior foundation under Rule 613(b), a trial court is free to use its informed discretion to exclude extrinsic evidence of prior inconsistent statements on grounds of unwarranted prejudice, confusion, waste of time, or the like. * * * Moreover, *Barrett* notwithstanding, Fed. R. Evid. 611(a) allows the trial judge to control the mode and order of interrogation and presentation of evidence, giving him or her the discretion to impose the common-law 'prior foundation' requirement when such an approach seems fitting.").

Given that the courts of appeals, including the First Circuit, have generally committed the admission of extrinsic impeachment evidence to the sound discretion of the trial court, review is not warranted in this case because the outcome would not have been different in any other circuit.[2]

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[2] In support of his claim of a circuit conflict, petitioner cites a Vermont state case, *State* v. *Danforth*, 956 A.2d 554 (Vt. 2008), that contrasts the First Circuit's "minority" rule that requires the court to inquire into the availability of the witness to be impeached before it can

4. Petitioner's other challenges to the district court's evidentiary ruling do not merit this Court's review. He contends (Pet. 31) that, independent of Rule 613(b), Cantarella's testimony was admissible as a coconspirator statement. This argument is beyond the scope of the question presented by the petition, see Sup. Ct. R. 14(1)(a), and was not made to the court of appeals. It is also wrong: Federal Rule of Evidence 801(d)(2)(E) requires that the "statement by a coconspirator of a

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exclude the extrinsic evidence with the positions of six other circuits that purportedly reject that approach. Pet. 15-19 & n.2. As petitioner acknowledges (Pet. 16-18), however, *Danforth* ignored other cases from circuits taking the "majority" position that do not *require* that the witness be confronted with the inconsistent statement before it can be introduced. See, *e.g.*, *Moore*, 149 F.3d at 781 (8th Cir.); *Bibbs*, 564 F.2d at 1169 (5th Cir.); *United States* v. *Speece*, No. 92-3077, 1993 WL 17105, *4 (10th Cir. Jan. 26, 1993) (unpublished) (citing *Barrett* for the proposition that "foundation for impeachment by prior inconsistent statements desirable but not absolutely required under the rule if court gives opportunity to explain or deny at some time during trial"). And even courts of appeals that apply the traditional rule by affirming decisions of trial courts to exclude proffered evidence, in particular cases and under the abuse of discretion standard, have left the door open to the admission of the extrinsic evidence before the Rule 613(b) foundation is satisfied. See, *e.g.*, *Schnapp*, 322 F.3d at 572 ("[T]he district court had the option to allow defendant to testify regarding [the witness's] alleged prior inconsistent statement, and then permit the government to recall [the witness] to explain or deny the alleged statement. * * * Upon careful review, we cannot say that the district court's decision to disallow defendant's testimony regarding [the witness's] alleged prior inconsistent statement rises to the level of an abuse of discretion."); *Hames*, 185 Fed. Appx. at 322 (acknowledging that foundation need not precede impeaching witness's testimony, but concluding that trial court did not abuse its discretion in excluding the evidence); *Surdow*, 121 Fed. Appx. at 900 (same).

party" must be offered against the party—not against an opponent.[3]

In addition, petitioner's argument (Pet. 27-28, 32-36) that the district court erred in concluding that the impeachment evidence was collateral misinterprets the district court's ruling. Petitioner relies principally on *United States* v. *Harvey*, 547 F.2d 720 (2d Cir. 1976), for the proposition that a witness's motives, interest and bias in testifying against a defendant are never collateral matters. In that case, the court of appeals held that the district court abused its discretion in excluding evidence (not limited to prior inconsistent statements) that a principal witness was biased against the defendant because he had fathered the witness's child and refused to pay support. Here, by contrast, the proffered evidence did not pertain to Vitale's bias against petitioner, and the district court correctly reasoned (Pet. App. 25A) that Vitale's personal motives (or lack thereof) for wanting to kill Perrino were collateral to the issue of whether petitioner also participated in the murder. For the same reason, because Vitale never claimed that it was petitioner and not he who "wanted Perrino murdered" (Pet. 28), petitioner's contention (Pet. 29) that the admission of the prior inconsistent statement would have "create[d] a reasonable doubt that did not otherwise exist"

[3] Petitioner was not precluded from calling Cantarella as a defense witness to support his theory that Vitale had a personal motive to kill Perrino and that he asked his other associates, and not petitioner, to commit the murder. Indeed, petitioner candidly acknowledged below that he did not want to call Cantarella for that purpose because he wanted to strictly limit the government's cross-examination. See Pet. C.A. App. 202-203. Having made that choice, however, petitioner cannot now complain (Pet. 31) that he was denied the right to elicit testimony from Cantarella that did not involve prior inconsistent statements by Vitale.

is unsupported (quoting *Jimenez* v. *Walker*, 458 F.3d 130, 146 (2d Cir. 2006), cert. denied, 549 U.S. 1133 (2007)).[4]

Finally, petitioner's fact-bound claim (Pet. 24-27) that the district court erred in finding that petitioner did not afford Vitale a sufficient opportunity to deny or explain the statements he made to Cantarella does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioner's reliance (Pet. 21) on *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), for his similar contention that the district court's evidentiary ruling denied him "the right to present witnesses in his own defense and a fair trial" is unavailing. In *Chambers*, the Court held that due process was violated when a murder defendant was prevented from cross-examining an individual [McDonald] who had given a sworn confession that he was the murderer but later recanted it, and from putting before the jury three witnesses who would have testified that McDonald had confessed to them in circumstances "that provided considerable assurance of [the confessions'] reliability." *Id.* at 300. The trial court's rulings prevented the defendant from effectively challenging McDonald's explanation for the recanted confession, an explanation that would have been difficult to reconcile with the proffered testimony of the three witnesses, which powerfully incriminated McDonald. The limitations imposed in *Chambers* prevented the defendant from raising substantial questions about his alleged guilt; that was not the case here.